evidence to support the conviction and there are therefore no grounds to make any other order.

For the reasons we have stated, we would answer the question in the affirmative provided that the evidence is in support of his alibi and not a bare denial.

Order accordingly.

Solicitors: *Lawrence, Dhillon & Associates.*

Reported by *Prof Ahmad Ibrahim*

Public Prosecutor v Phon Nam

SUPREME COURT (KUALA LUMPUR) – SUPREME COURT CRIMINAL APPEAL NO 66 OF 1986
ABDUL HAMID AG LP, MOHAMED AZMI AND ABDOOLCADER SCJJ
24 JUNE 1987 AND 13 OCTOBER 1988

Criminal Procedure – Charge of trafficking in dangerous drugs – Chemist reports served on accused – Receipt acknowledged by accused – Police officer who served the reports not called – Close of case for prosecution – Application by prosecution to call police officer after close of prosecution case – Refused – Discretion of trial judge to be exercised judicially – Criminal Procedure Code (FMS Cap 6), ss 399 & 425

In this case the respondent had been tried for trafficking in dangerous drugs. The drugs had been sent to the government chemist and had been received back with the two chemist reports. The reports had been served on the respondent pursuant to s 399 of the Criminal Procedure Code (FMS Cap 6) by a detective police constable. The respondent acknowledged receipt by endorsing on the reverse of the reports. At the trial the detective police constable was not called by the prosecution to testify nor was he offered to the defence at the close of the prosecution case. Nevertheless there was evidence to show that the respondent endorsed on the reverse of the reports to acknowledge receipt. When the prosecution closed its case the learned trial judge drew the attention of the learned DPP to the fact that the detective police constable had not given evidence whereupon the DPP applied for leave under s 425 of the Criminal Procedure Code for the court to summon the detective police constable. The learned trial judge after hearing arguments refused the application and acquitted and discharged the respondent without calling for the defence (see [1987] 2 MLJ 262). The Public Prosecutor appealed.

Held, allowing the appeal:

(1) Although the learned trial judge rightly held that the power under s 425 of the Criminal Procedure Code is discretionary, he, however, failed to exercise his discretion judicially.

(2) In the instant case the facts of the case did not justify the refusal by the learned judge. He failed to appreciate that the evidence given by the investigating officer pertaining to the endorsements of receipt of service by the respondent were admissible in evidence. No challenge was in fact made by the defence counsel that the service was not properly effected. Evidence by the detective police constable would therefore be a mere formality to confirm the endorsements that the respondent had made. The learned judge clearly failed to appreciate this and consequently there was a failure to exercise the discretion judicially.

(3) The court is bound to admit fresh evidence under s 425 of the Criminal Procedure Code when it appears essential to a just decision of the case. As the powers under this section are very wide it is therefore necessary that great care be taken when exercising such discretion. However, the second limb of the section being an imperative provision the court must give serious consideration to exercising such powers if in so doing a just and proper decision could be arrived at.

Cases referred to

1 *Maxwell* v *The Director of Public Prosecutions* [1935] AC 309 (refd)
2 *Ramli bin Kechik* v *PP* [1986] 2 MLJ 33 (folld)
3 *Mohd Azam* v *Mohd Iqbal* PLD 1984 SC 95 (refd)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) ss 399, 425
Dangerous Drugs Act 1952 s 39B(2)

Cik Su Geok Yiam (Deputy Public Prosecutor) for the Public Prosecutor.

Karpal Singh for the respondent.

Cur Adv Vult

Abdul Hamid Ag LP (delivering the judgment of the court): This was an appeal by the Public Prosecutor against the decision of the learned judge in the High Court at Alor Setar on 1 October 1986 where the respondent was acquitted and discharged without his defence being called. The respondent was tried for trafficking in 128.80g of heroin ('the drug') on 25 October 1983, in contravention of s 39B(1)(a) of the Dangerous Drugs Act No 30/52 (Laws of Malaysia Act 234) and punishable under s 39B(2) of the same Act.

In the course of the trial the investigating officer testified that he received the drug together with other exhibits and personally sent them to the government chemist on 28 October 1983 and 4 April 1984 under seal. He received them back from the Chemistry Department together with two chemist reports (produced and marked as exh P25 and P26) on 14 February 1984 and 7 May 1984. These reports were served on the respondent on 24 May 1984 pursuant to s 399 of the Criminal Procedure Code (FMS Cap 6) by one Detective Police Constable 56729 Yunan. The respondent acknowledged receipt by endorsing on the reverse of P25 and P26. For some reason DPC Yunan was not called by the prosecution to testify nor was he offered to the defence at the close of the prosecution case. Nevertheless there was evidence to show that the respondent endorsed on the reverse of both P25 and P26 to acknowledge receipt.

At that point when the prosecution closed its case the learned judge drew the learned deputy public prosecutor's attention to the fact that DPC Yunan had not given evidence whereupon the deputy public prosecutor applied for leave under s 425 of the Criminal Procedure

Code for the court to summon DPC Yunan. The defence counsel as a matter of course objected to the application. After hearing arguments the learned judge upheld the defence objection, refused the application and acquitted and discharged the accused without calling for the defence. Hence the appeal.

For reasons that we shall state shortly the appeal was allowed and the order of acquittal and discharge set aside and the case was ordered to be remitted back for the court to invoke s 425 of the Criminal Procedure Code. We indicated that we would at a later date give reasons for our decision. We do now.

When the learned deputy public prosecutor asked the court to invoke s 425 of the Criminal Procedure Code, he did concede that the omission to call the constable was an oversight on the part of the prosecution, but regardless he argued that it was a matter for the court to exercise its discretion to call any person to be examined if it was essential to the just decision of a case.

The crucial question before us therefore was whether the learned judge acted rightly when he declined to exercise his powers. Although he rightly held that the power under s 425 of the Criminal Procedure Code is discretionary, he, however, failed to exercise the discretion judicially. He formed the view and we quote:

> Having regard to all the circumstances, including my view on the effect of our system of trial being adversarial, I did not think I should exercise my discretion by invoking s 425 of the Criminal Procedure Code. I therefore declined to exercise it.

The learned judge observed that the oversight on the part of the prosecution to call DPC Yunan had resulted in the prosecution's failure to prove the case. And he decided that he ought not to exercise his discretion under s 425 of the Criminal Procedure Code, in particular, in view of what was said by Viscount Sankey LC in *Maxwell* v *The Director of Public Prosecutions*[1] as follows:

> It must be remembered that the whole policy of English criminal law has been to see that as against the prisoner every rule in his favour is observed and that no rule is broken so as to prejudice the chance of the jury trying the true issue. The sanction for the observance of the rules of evidence in criminal cases is that, if they are broken in any case, the conviction may be quashed ... It is often better that one guilty man should escape than that the general rules evolved by the dictates of justice for the conduct of criminal prosecutions should be disregarded and discredited.

Our s 425 of the Criminal Procedure Code clearly states and we quote:

> Any court *may* at any stage of any inquiry, trial or other proceeding under this Code summon any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine any person already examined, and the court *shall* summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case. (Emphasis is ours)

Now this court had on a previous occasion considered the effect of s 425 of the Criminal Procedure Code. We refer to the case of *Ramli bin Kechik* v *PP*[2] where it was held that:

> By its very nature the discretion to be exercised under s 425 of the Criminal Procedure Code depends on the facts of each case, the main consideration being the essentiality of the additional evidence to a just decision of the case. If there is the apprehension of justice failing by an erroneous acquittal or by an erroneous conviction the court would be justified in exercising its discretion in calling for additional evidence under this section ... The object of the section is just as much the prevention of escape of a guilty person through some carelessness of the prosecution or the magistrate as the vindication of the innocence of the person wrongly accused owing to the carelessness and ignorance of one party.

In the instant case the facts of the case did not justify the refusal by the learned judge. In our view, he failed to appreciate that the evidence given by the investigating officer pertaining to the endorsements of receipt of service by the respondent and such endorsements on the reverse of exh P25 and P26 were admissible in evidence. No challenge was in fact made by the defence counsel that the service was not properly effected. Evidence by DPC Yunan would therefore be a mere formality to confirm the endorsements that the respondent had made on the reverse of exh P25 and P26. The learned judge clearly failed to appreciate this and consequently there was a failure to exercise the discretion properly.

We should state at this point that it is settled principle that on appeal an appellate court is slow to interfere with the exercise of a discretion by a judge in the court below; however, it would do so where the judge had not exercised the discretion judicially and in accordance with well-known legal principles.

In the present case we had some doubt that the judge had properly considered the effect of s 425 of the Criminal Procedure Code, in particular, the second limb of that section.

Section 425 of the Criminal Procedure Code is clearly divided into two limbs; first, a discretionary provision which provides that the court may, on an application, summon any person as a witness or recall and re-examine any person already examined at any stage of any inquiry, trial or other proceeding under the Code. In exercising the discretion under the first limb, the court clearly must proceed with utmost circumspection especially when there was likelihood of the fresh evidence proving to be prejudicial to the accused. Secondly, an imperative provision which requires the court to do so where the court is satisfied that the evidence to be summoned would appear to the court to be essential to a just decision of the

case. (See *Mohd Azam* v *Mohd Iqbal*[3] with the corresponding section in the Pakistan Criminal Procedure Code.)

In this regard the court is bound to admit fresh evidence when it appears essential to a just decision of a case. As the powers under this section are very wide it is therefore necessary that great care be taken when exercising such discretion. However, the second limb of this section being an imperative provision the court must give serious consideration to exercising such powers if in so doing a just and proper decision could be arrived at.

It is for these reasons that we made the order that we did.

Order accordingly.

Solicitors: *Karpal Singh & Co.*

Reported by *Prof Ahmad Ibrahim*

Soon Teck Finance (M) Bhd v Public Finance Bhd

HIGH COURT (PENANG) – CIVIL SUIT NO 517 OF 1978
MOHAMED DZAIDDIN J
14 MARCH 1988

Hire Purchase – Better title to repossessed car – Dispute by two finance companies – Original vehicle registration number and 'ownership claimed' indorsement changed on vehicle registration card – Defendant prima facie legal owner on the face of vehicle registration card – Onus on plaintiff to show that defendant's title was acquired illegally

The plaintiff entered into a hire-purchase agreement with C for the hiring of a vehicle bearing registration no AV 3366. The vehicle was then registered with the Registrar and Inspector of Motor Vehicles, Penang in the name of C but with the 'ownership claimed' by the plaintiff. C never paid the instalments due and the plaintiff terminated the agreement. In the course of repossession inquiries, the plaintiff discovered that the registration no AV 3366 had been changed to PY 4598 and the indorsement of 'ownership claimed' had been cancelled and replaced by the defendant company. The plaintiff sought, inter alia, a declaration that the vehicle is the property of the plaintiff. During the trial, the defendant called three witnesses to testify that the hire-purchase transactions in respect of vehicle registration no PY 4598 was proper and legal and in accordance with normal business transactions. It is common ground that the only issue in this case was who has a better title to the vehicle.

Held, dismissing the plaintiff's claim:

(1) On the face of all available documents, in particular the vehicle registration card, the defendant is prima facie the legal owner as he is the registered owner under the 'ownership claimed' of the vehicle bearing registration no PY4598.

(2) Since the plaintiff is disputing the defendant's title to the vehicle, the onus is on the plaintiff to show that the defendant had acquired the title of the vehicle illegally or without proper inquiry or that he was not a purchaser in good faith.

(3) The plaintiff had failed to adduce any evidence to show that he has a better title to the vehicle. The defendant company was a purchaser in good faith of the vehicle without notice of any defect in the seller's title. The defendant had also made adequate inquiries in the ordinary course of business to determine that the vehicle was free from any defect as to its title.

Legislation referred to
Hire Purchase Act 1967

Chin Fook Yen for the plaintiff.
Choy Kam Lee for the defendant.

Cur Adv Vult

Mohamed Dzaiddin J: The plaintiff is a finance company having its registered office at No 43-53, 3rd floor, Penang Road, Penang and carrying on business in the financing of the purchase of motor vehicles under hire-purchase agreements. On 24 September 1977, the plaintiff entered into a hire-purchase agreement with one Chong Chan Fatt of No 98, Jalan Besi, Island Park, Penang ('the hirer') for the hiring of one Mercedes Benz, 240D diesel saloon car bearing chassis no 115117-60-086904; engine no 616916-20-068283 and registration no AV 3366 ('the said vehicle') for a total sum of $33,000 payable by a deposit of $12,000 and the balance by 24 hire rentals. The said vehicle was registered with the Registrar and Inspector of Motor Vehicles, Penang on 24 September 1977 in the name of the hirer, but with the 'ownership claimed' by the plaintiff.

Unfortunately, the hirer never paid the instalments due and in compliance with the terms of the hire-purchase agreement (P1) and the Hire Purchase Act 1967, the plaintiff terminated the said agreement and became entitled to immediate possession of the said vehicle. However, it was only on 6 January 1978 that the plaintiff succeeded in repossessing the said vehicle from Kwong Soon Cheong Co Sdn Bhd, 43, Market Street, Ipoh ('the said B company'). In the course of the inquiries, the plaintiff discovered that the registration no AV 3366 had been changed to PY 4598 and the indorsement of 'ownership claimed' had been cancelled and replaced by 'hak milik di-tuntut oleh Public Finance Bhd' dated 5 December 1977 (AB1 p 8). Therefore, by this writ of summons, the plaintiff has asked this court for a declaration that the said vehicle is the property of the plaintiff and for damages and consequential orders and costs. It is common ground that the only issue in this case is: who has a better title to the said vehicle?

On the face of all available documents before me, in particular the vehicle registration card, AB1, the defendant being the registered owner under the 'ownership